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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

SKOURAS THEATRES CORPORATION, a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 643

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGEHAND EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 642,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGEHAND EMPLOYEES AND MOVING PICTURE OPERA-

TORS OF THE UNITED STATES AND CANADA, LOCAL 642, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered July 7th, 1966, which directed petitioner to comply with an order of the National Labor Relations Board. In the court below the parties printed a joint record on appeal. The references which follow are to the printed record.

STATEMENT OF THE MATTER INVOLVED.

The heart of a moving picture theatre is the projection booth. This houses the expensive machinery and skilled operator whose complementary efforts are needed to project an image on the screen. We are here concerned with the operator. A graphic illustration sharpens perception.

The audience is in the theatre; the picture is in the machine but the operator is missing. What to do? Where can a replacement be found? Only through a local, of which this petitioner is typical. A replacement must be had at once. An advertisement cannot be placed in a newspaper. A call to an employment agency would be fruitless as well as time-consuming. This is true not only of emergent replacements, but also of permanent employees.

The above circumstances are thoroughly known to both employer and labor. Their appreciation of the situation brought about a labor peace which has existed since 1926, to date. Not only has there been this enduring peace, but it has existed without complaint.

Petitioner is an affiliate of the International Alliance of Theatrical Stagehand Employees and Moving Picture Operators of the United States and Canada, Local 642. This organization in turn is a part of the AFL-CIO. Its jurisdiction is limited to Bergen County, New Jersey. Skouras operates motion picture theatres in New York and New Jersey. Seven of these are located in Bergen County

(R 42a). Petitioner has supplied the projectionists to Skouras since 1926 (R 104a).

From 1931 until 1947 petitioner and Skouras had a closed shop agreement. With the passage of the Taft-Hartley Law in 1947, the closed shop was abandoned. In its place and stead, petitioner and Skouras made separate agreements for each theatre. A typical contract is printed at R 237a. It covers simply hours and rate of pay. It contains no suggestion that employment is limited to union members, nor does it call on the union to supply employees.

Skouras has at all times retained full freedom of movement. It can hire and fire whom it pleases. There is a practical difficulty. As pointed out above, the only practical source of supply of qualified men is in unions (R 192a).

Petitioner elects persons to membership by a majority vote of its members. An applicant must obtain a blank and file it, bearing the sponsoring signatures of three members of the union. He must also pay one-half of the initiation fee. The application is sent by the union to International for approval. If approved there, it is returned to the union, which, through its examining committee, determines the fitness of the candidate. If the candidate passes the examination, his application is submitted for a vote by secret ballot. If elected by a majority, he pays the balance of his initiation fee and becomes a member (R 121a).

His claim for seniority is based on the time admitted to the union. Assume that a permanent position is open in Skouras. Whom shall the union send to Skouras as its candidate for replacement? An announcement is made at a union meeting that a permanent position is available. Any member desiring the job puts in his bid. At a regular union meeting, all bids are scrutinized. The man with the longest seniority is the one sent to Skouras. It evaluates the man and decides whether to keep or reject him (R 114a-115a).

The turnover of labor is suprisingly small. In a 34-year period Skouras built two new theatres in Bergen County (R 272a). Thus vacancies occur only when new theatres are built, a man dies, or leaves the job. Actually, there are not enough jobs to go around (R 131a). A former president of the union said he could recall but two openings in 25 years, and the trial examiner commented that it was a highly healthy job. This particular witness had been employed for 34 years (R 132a).

There are vacancies of a temporary nature which occur on an average of a half dozen times a month. These arise because of illness, personal needs, or the like. When these exigencies occur, the business agent of the union sends qualified men as replacements (R 148a).

If union men are available, the business agent gives them preference. If they are not, he finds other qualified men (R 106a-107a).

Permanent employees are referred by the union itself. It does not send non-union men for these positions.

We referred above to the fact that there was no complaint about the operation of this system. This was changed in October or November of 1963 when Sidney Jackson inquired concerning union membership. He never completed his application but did file a complaint on March 12, 1964 alleging petitioner prevented him from exercising the rights guaranteed him by Section 7 of the National Labor Relations Act. He specified that petitioner caused, or attempted to cause, Skouras not to hire him. He also asserted that the initiation fee was discriminatory (R 3a-4a). He made a similar complaint against Skouras.

This complaint triggered the controversy before the National Labor Relations Board. Suffice it here to say that there was no merit to either charge, and the examiner so found, and the full Board concurred in those findings. Jackson need not, therefore, detain us. What did happen

was that the trial examiner and the Board found that the arrangement referred to above constituted an unfair labor practice on the part of both employer and petitioner. To reduce the matter to a lower grade, the Board asserted that the union and the employer operated a closed shop.

Despite the fact that the trial examiner said, and with this statement we agree, that there was no real dispute as to the facts, the Court of Appeals discovered a factual situation, said there was support for that factual determination in the record, and affirmed on that basis.

This method of treatment not only evades a determination of the legal questions which petitioner wanted decided, but it also sets at naught the decisions of this court in *Local 357 Teamsters Union* vs. *N. L. R. B.*, 365 U. S. 667 (1961) and *International Typographical* vs. *N. L. R. B.*, 365 U. S. 705 (1961).

The present petition seeks to review the error of the United States Court of Appeals for the Third Circuit in passing over the important legal questions involved on the theory that it is a matter of credibility.

JURISDICTION.

The jurisdiction of this Court is invoked under *Title 28 U. S. Code, Section 1254.*

THE APPLICABLE STATUTES IN PERTINENT PART.

Section 7 of the National Labor Relations Act reads as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8a subsections (1) and (3) reads as follows:

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made; (and has at the time the agreement was made or within the preceding twelve months received from the board a notice of compliance with sections 9 (f), (g), (h)), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *provided further,* That

no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board was justified in holding that because the employer looked to petitioner for qualified employees, a closed shop existed?

2. Did not the National Labor Relations Board and the Court of Appeals effectively overrule the decisions by this Court in *N. L. R. B.* vs. *Local 294*, 365 U. S. 667 (1961) and *International Typographical Union* vs. *N. L. R. B.*, 365 U. S. 705 (1961)?

3. Did not the Court of Appeals effectively overrule the two prior decisions by attempting to dispose of the issue as one of credibility?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The National Labor Relations Act was adopted to give uniformity to the law throughout the 50 States of the Union. Absent such a law, the States would speak discordantly on matters of national policy. The decision we ask this Court to review is not limited in its terms and reach to a small union in Bergen County, New Jersey. It was promulgated by a national administrative agency located at the seat of

government. It purports to be a declaration of national policy. It also represents, in our judgment, an attempt by the National Labor Relations Board to reinstate a doctrine which this Court has said would be an attempt to amend the Act itself. In *Local 357 Teamsters Union* vs. *N. L. R. B., supra,* this Court had before it a decision of the National Labor Relations Board which struck down as illegal *per se* an agreement between employer and union under which the employer would seek his employees through the union. There the employer agreed to hire casual employees only if referred to the employer through a union hiring hall, it being specifically provided that there should be no discrimination against casual employees because of the presence or absence of union membership. This Court had occasion to consider the history of the Act in this connection and concluded that such an arrangement did not violate either the spirit or letter of the Act. Mr. Justice Douglas said:

> "It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well." *365 U. S. at 675-676, 81 S. Ct. at 839-840, 6 L. Ed. 2d 11.*

This Court also had the analogous situation before it in *N. L. R. B.* vs. *News Syndicate, Inc.*, 365 U. S. 695 (1961). There, among other things, the question was whether it was

an unfair labor practice for a union to strike because it wanted the foremen, all union men, to do the hiring. This Court was divided as to some phases of that case, but with respect to this clause, it said:

> "We also believe the Court of Appeals was right in concluding that the contract on its face is not unlawful even though the foremen—who are union members—do the hiring. In the first place, the contract (unlike the General Laws) does not require journeymen and apprentices to be union members. In the second place, the provisions of the contract which we have set forth make the foremen 'solely the employers' agents,' as the Court of Appeals concluded. *279 F. 2d, at 330.* Finally, as we said in *Teamsters Local 357* vs. *Labor Board,* decided this day, *ante, p. 667,* we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, 'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.' *279 F. 2d, at page 330.*"

An article by Stuart Rothman, then General Counsel for the Board, appears in *48 Va. Law Review 871,* entitled: *"The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements."* At page 871 he said:

> "Regardless of the form employed, however, the Board has consistently attempted to regulate only referral systems that are exclusive. Thus, in the absence of an *exclusive* hiring arrangement, a union is free to refer or not to refer applicants for any reason."

We see no need of further elaboration on this point. When we turn to the trial examiner's decision (R 273a),

we find he holds "upon substantially uncontraverted testimony" that the petitioner and employer maintained and enforced "an exclusive referral agreement, understanding, arrangement or practice pursuant to which permanent employment as a projectionist in Skouras Theatres was available only to members of the union." He came to the same conclusion with regard to temporary projectionists.

As to the first part of this finding, there were two vacanies filled in 25 years. Finding an exclusive referral agreement, etc., on the basis of such course of conduct is stretching a point. As to the second part of his conclusion, it is sufficient to say that both as to permanent employment and temporary replacements, Skouras at all times had full freedom of movement. Basically, then, the trial examiner adopted the same philosophy expounded by his superior, and which this Court struck down in the two cases we mentioned above.

In the Court of Appeals we had a different approach. A man named Lennes was employed by Skouras as a zone manager. He is alleged to have stated to Jackson that Skouras ran a closed shop and that he could not obtain employment unless he was a union member (R 85a). Lennes denied the conversation in part, but his denial left much to be desired. The Court of Appeals, at the oral argument, felt that this raised a factual question and it did not have to touch on the legal questions presented. Its opinion was based on that theory. It sought to slough off the important questions here involved on the question of credibility as between Mr. Jackson and Mr. Lennes. It overlooked entirely the fact that Lennes could not speak for the Local, and that his admissions in no sense were admissions against the Local. The Court below also overlooked the fact that a judgment against the Local could not be founded on the extra judicial admissions made by an agent of the employer. More important is the fact that the president of Skouras testified unequivocally that his organization had full freedom of movement to hire and fire whom it pleased. He

adverted to the very fact mentioned by Mr. Justice Douglas in the *Teamsters* case, and that is that the union was the principal source of skilled employees.

The very purpose of the National Labor Relations Act was to promote peace and stability in the labor movement. Here we have had peace over a 40-year period with no strikes, no lockouts, no sit ins. We are not told of a single case during this entire period of time when a qualified employee, or prospective employee, was denied employment bcause he was not a union man. The record is silent on any one applying to Skouras and being denied employment because he was not a union man.

We say that the decisions we seek to review, both in the Court of Appeals, and before the National Labor Relations Board, is an attempt to circumvent the holdings of this Court under the guise of deciding a fact question.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MAJOR & MAJOR,
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MILTON T. LASHER,
Of Counsel.

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vs.
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Respondent.

APPENDIX TO PETITION FOR CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15662
and
No. 15671

SKOURAS THEATRES CORPORATION,
Petitioner in No. 15662

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent in No. 15662

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGEHAND EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 642,
Petitioner in No. 15671

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent in No. 15671

ON PETITIONS TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued May 24, 1966

Before: HASTIE and GANEY, *Circuit Judges;* and WRIGHT, *District Judge.*

OPINION OF THE COURT

(Filed June 7, 1966)

PER CURIAM:

We are asked in this case to review and set aside an order of the National Labor Relations Board which, in

principal part, required Skouras Theatres Corp., the operator of a chain of motion picture theatres, and the union which represented its projectionists to desist from maintaining or enforcing an informal understanding and agreement under which Skouras was to rely exclusively upon the union for the referral of prospective permanent employees as required, it being further understood that only union men would be supplied for permanent work and that union men would be given preference for temporary work. The order also contained related requirements, including the posting of appropriate notices.

The principal issue is whether the record establishes that the employer and the union agreed upon and observed such an arrangement as the Board's order describes and proscribes. We are satisfied that there was substantial evidence, which the Board could reasonably credit, of the existence and implementation of such an arrangement.

A separate point, challenging the jurisdiction of the Board, is also without merit. It adequately appears that the operation of the Skouras theatre chain was a multi-million dollar enterprise involving large scale interstate transportation of films for commercial exhibition.

A decree enforcing the Board's order will be entered.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 643

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE-HAND EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 642, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time:

The decree of the court of appeals (App., *infra*, pp. 3-4) was entered on July 7, 1966. The petition

for a writ of certiorari was filed on October 7, 1966, ninety-two days after entry of the decree. No extension of the time for filing the petition was applied for or granted.[1] Since the 90-day limitation for filing a petition for a writ of certiorari imposed by 28 U.S.C. 2101(c) is jurisdictional, the petition is untimely, and therefore should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1966.

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[1] Although the court of appeals on July 22, 1966, stayed the issuance of its mandate pending the filing of a petition for certiorari by October 5, 1966, such stay did not extend the time for petitioning.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15662

SKOURAS THEATRES CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 15671

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE-HAND EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 642, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: HASTIE and GANEY, *Circuit Judges:* and WRIGHT, *District Judge.*

THIS CAUSE came on to be heard upon petitions for review filed by the above named petitioners and upon the cross petitions of the National Labor Relations Board for enforcement of its order issued by it against the said petitioners. The Court heard argument of respective counsel on May 24, 1966, and has considered the briefs and transcript of record filed in this cause. On June 7, 1966, the Court being fully advised

in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Skouras Theaters Corporation, its officers, agents, successors and assigns and The International Alliance of Theatrical Stagehand Employees and Moving Picture Operators of the United States and Canada, Local 642, its officers, agents and representatives, abide by and perform the directions of the Board in said order contained.

BY THE COURT

WILLIAM H. HASTIE
Circuit Judge

DATED: JULY 7, 1966

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